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defendant brings error. Reversed and remanded. Harrison, J., absent.

*William & Tunstall*, for plaintiff in error.

*Thorp & Bowden*, for defendant in error.

#### Note.

The rule laid down here that ordinary care is all that is required of a company of this character, does not go as far as that announced in the West Virginia case, *Bice v. Wheeling Electrical Co.*, 62 W. Va. 685, 59 S. E. 626, declaring that they are required to exercise the highest degree of care. But it will be noticed that the court here says that "ordinary care may, in some cases, involve the exercise of greater skill than in others," and distinguishes and reconciles *Norfolk Railway, etc., Co. v. Spratley*, 103 Va. 380, 49 S. E. 502. So it seems that the result is practically the same, the West Virginia court saying or requiring the highest degree of care, and our court requiring ordinary care, but saying that ordinary care means more in proportion as the risk is increased from the nature of the business engaged in.

J. F. M.

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#### SOUTHERN RY. CO. v. FOSTER'S ADM'R.

Jan. 12, 1911.

[69 S. E. 972.]

**1. Trial (§ 252\*)—Instructions—Applicability to Evidence.**—Instructions are to aid the jury to apply the law to the facts, and should be given only on the case which the evidence tends to sustain; so that one declaring the master's duty as to furnishing a safe place to work should not be given, though the declaration alleges negligence in the performance of the duty, in the absence of proof to sustain the allegation.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 596-612; Dec. Dig. § 252.\* 7 Va.-W. Va. Enc. Dig. 718.]

**2. Master and Servant (§§ 101, 102\*)—Duty of Master—Appliances.**—It is the master's duty to exercise ordinary care to provide, not "safe and suitable" appliances, but "reasonably safe and suitable" appliances, for the use of the servant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 173; Dec. Dig. §§ 101, 102.\* 9 Va.-W. Va. Enc. Dig. 675, et seq.]

**3. Master and Servant (§ 206\*)—Assumption of Risk—Manner of Conducting Business.**—Notwithstanding Const. 1903, § 162 (Code 1904, p. cclix), and Code 1904, § 1294k, abolish the doctrine of assumption of risk, so far as it applies to knowledge by a servant of a railroad "of the defective or unsafe character or condition of any machinery, ways, appliances or structures," he still assumes all the

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

other ordinary and usual risks incident to the service, including the risks incident to the manner in which he knows, or in the exercise of ordinary care ought to know, the master conducts its business.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 550; Dec. Dig. § 206.\* 9 Va.-W. Va. Enc. Dig. 698, 705.]

**4. Master and Servant (§ 295\*)—Assumption of Risk—Instruction.**—The instruction given for plaintiff that, “when a person enters the employ of a railroad company as a brakeman, he only assumes the ordinary and usual risks that are incident to such employment,” is defective in excluding, at least seemingly, the additional risk, if any, incident to the known manner in which the railroad conducts its business.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 295.\* 9 Va.-W. Va. Enc. Dig. 698, 705.]

**5. Master and Servant (§ 293\*)—Care Required of Master—Instructions.**—Defendant in an action for injury to its brakeman requested an instruction, which, after declaring what constituted ordinary care, stated that, if the jury believed that certain facts were established, they should find for defendant. Between the last of such facts, which was if the car was being handled in the way usual to defendant and other railway companies, and the conclusion that they should find for defendant, the court inserted the words “and with reasonable care under all the circumstances.” Held, that the addition, whatever the purpose of making it, made the instruction erroneous, as imposing a higher degree of care than the law requires.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1161; Dec. Dig. § 293.\* 9 Va.-W. Va. Enc. Dig. 689.]

**6. Master and Servant (§§ 101, 102\*)—Care Required of Master.**—A master is not required to exercise a higher degree of care than that exercised by the average prudent man engaged in like business.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 173; Dec. Dig. §§ 101, 102.\* 9 Va.-W. Va. Enc. Dig. 689.]

**7. Master and Servant (§ 293\*)—Ordinary Care of Master—Instructions.**—Amending an instruction in an action for injury to defendant’s brakeman defining ordinary care as such care as reasonably prudent companies or persons use in the conduct of like business, and stating that defendant was not negligent if it was switching its cars in the usual way adopted by it and other companies engaged in the same business, by adding, and if it “used ordinary care in switching said cars,” left the jury without any guide as to what constitutes ordinary care in switching cars.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 293.\* 7 Va.-W. Va. Enc. Dig. 727.]

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep’r Indexes.

Appeal from Circuit Court, Pittsylvania County.

Action by C. D. Foster's administrator against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded for new trial. Cardwell, J., absent.

*Wm. Leigh*, for plaintiff in error.

*B. H. Custer* and *Geo. T. Rison*, for defendant in error.

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ATLANTIC TRUST & DEPOSIT CO. v. UNION TRUST & TITLE CORPORATION.

Jan. 12, 1911.

[69 S. E. 975.]

**1. Evidence (§ 419\*)—Parol Evidence—Consideration of Bond.**—In an action on a bond conditioned on the making of a loan and the erection by the principal of a building free of mechanics' liens within a time limited, the obligee may show a loan to the principal on different terms than those set out in the recitals on the bond, if the difference in the terms was known to the surety when it executed the bond.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.\* 13 Va.-W. Va. Enc. Dig. 18, et seq.]

**2. Corporations (§ 428\*)—Representation by Officers and Agents—Notice to Officer or Agent.**—Knowledge acquired by officers or agents of a corporation in transactions affecting their business and employment must be regarded as actual notice to the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1748-1761; Dec. Dig. § 428.\* 3 Va.-W. Va. Enc. Dig. 568.]

**3. Principal and Surety (§ 161\*)—Remedies of Creditor—Sufficiency of Evidence.**—In an action on a bond conditioned on the making of a loan to the principal obligor and the erection of a building free of mechanics' liens, within a time limited, evidence held sufficient to warrant the jury in charging the corporate surety with knowledge of the terms and conditions of the loan varying from those recited in the bond.

[Ed. Note.—For other cases, see Principal and Surety, Dec. Dig. § 161.\* 13 Va.-W. Va. Enc. Dig. 18, et seq.]

Error to Court of Law and Chancery of City of Norfolk.

Action by the Union Trust & Title Corporation against the Victoria Hotel Corporation and another. From a judgment for plaintiff, the defendant Atlantic Trust & Deposit Company brings error. Affirmed. Cardwell J., absent.

See, also, 110 Va. 286, 67 S. E. 182.

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.